A

SELVARAJU PONNIAH

v.

SURUHANJAYA PERKHIDMATAN AWAM MALAYSIA & ANOR

B

FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD FCJ
NIK HASHIM FCJ
AZMEL MAAMOR FCJ
C [CIVIL APPEAL NO: 01-01-2007 (W)]
14 SEPTEMBER 2007

PREVENTIVE DETENTION: *Detention order - Dismissal pursuant to detention order - Challenge to validity of detention order - Collateral*
D *proceeding - Limitation - Whether action time-barred - Federal Constitution, art. 135(2)(d) - Public Officers (Conduct and Discipline) (Cap D) General Orders 1980, General Orders 34, 35, 36(i) - Public Authorities Protection Act 1948, s. 2(a)*

PUBLIC SERVANTS: *Dismissal - Dismissal pursuant to detention*
E *order - Challenge to validity of detention order - Collateral proceeding - Limitation - Whether action time-barred - Federal Constitution, art. 135(2)(d) - Public Officers (Conduct and Discipline) (Cap D) General Orders 1980, General Orders 34, 35, 36(i) - Public Authorities*
F *Protection Act 1948, s. 2(a)*

The appellant, a driver with the Jabatan Peguam Negara, was suspended from his duties pursuant to General Order 34(2) of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 ('G.O. 1980') with effect from 5 August 1991 on the
G ground that he had been detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. Upon his dismissal from service, the appellant appealed against the order of dismissal to the Lembaga Rayuan ('Board'), which, on 19 October 1992, dismissed the appeal and conveyed this decision to the
H appellant *vide* a letter dated 26 November 1992. On 24 November 1995, the appellant filed an action against the 1st and 2nd respondents seeking a declaration that the dismissal was null and void and of no effect on the ground that it was based on an invalid detention order. The High Court dismissed the appellant's
I action and his subsequent appeal to the Court of Appeal was similarly dismissed. The appellant was then granted leave by this court to appeal on the following questions: (i) whether a detention

order can be challenged in a collateral proceeding; and (ii) where a person has been dismissed pursuant to a detention order, whether time begins to run from the date of the detention order or from the date the decision of the Board is communicated to the applicant.

Held (dismissing the appeal)
Per Nik Hashim FCJ delivering the judgment of the court:

(1) The validity of a detention order cannot be attacked in a collateral proceeding when written law precludes such an attack. In the present case, the written laws that precluded a collateral attack of the detention order were art. 135(2)(d) of the Federal Constitution and General Orders 34 and 35 of the G.O. 1980. By its provision, art. 135(2)(d) clearly took away the right of the appellant to be heard in the disciplinary proceedings taken against him solely on the existence of the detention order. General Orders 34 and 35 provide that the disciplinary authority of such proceedings is to decide on the appropriate punishment as provided for under General Order 36(i) of the G.O. 1980 upon the factual existence of the detention order. Thus, the legal power of the disciplinary authority allowed it to make a valid order to dismiss the appellant from service notwithstanding that the validity of the detention order was in question. (paras 8, 11 & 12)

(1a) It must also be pointed out that the appellant was making a collateral challenge by filing the writ and statement of claim to declare that his dismissal was null and void because the detention order used against him was not valid. The appellant could not challenge the validity of the detention order through the dismissal action that he brought. Firstly, the action was not framed as an action to challenge the validity of the detention, there being no prayer for a declaration that the detention order was null and void and the Deputy Minister not being made a party. Secondly, challenging the validity of the detention order was an abuse of the court's process because the appellant had failed to do so within the 36 months allowed by s. 2(a) of the Public Authorities Protection Act 1948 ('Act') to attack the detention order, which was made on 5 August 1991. The

time for the challenge expired on 4 August 1994 while the writ was only filed on 24 November 1995, a delay of more than 15 months after the expiry of the limitation period. This was a clear case to which the doctrine of collateral challenge did not apply. (para 13)

(1b) Thus, on the facts of the present case the appellant had failed to show that General Orders 34 and 35 of the G.O. 1980 were not complied with. The procedure was strictly followed and there was no flaw in the decision-making process of the disciplinary authority. In the circumstances, the answer to the first question was in the negative. (para 14)

(2) Section 2(a) of the Act is mandatory in its terms. The word "shall" is used twice in that section, indicating that the 36-month period in respect of time is a mandatory requirement and it cannot be abridged. It is, therefore, clear that time starts to run from the act complained of and not the communication of the decision. The 'act' in the present case was the decision of the Board dismissing the appellant's appeal. This decision was made on 19 October 1992 as stated in the letter dated 26 November 1992. Hence, the time to file the action ran from the date of the decision and the last day to file it would have been on 18 October 1995 and not on 25 November 1995. If time were to run from the date of communication of the decision on 26 November 1992 as contended by the appellant and not the date when the decision was made on 19 October 1992, then the provision in s. 2(a) of the Act would have said so in the section. However, here there was no such provision. Therefore, the appellant's contention was misconceived. Such being the case, the appellant's action was time-barred as he was 39 days late when he filed the action. Accordingly, the answer to the second question was that time ran from the date of the Board's decision dismissing the appeal by the appellant on 19 October 1992, and not the date of communication of the order of dismissal to the appellant on 26 November 1992. (paras 18 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang pemandu di Jabatan Peguam Negara, telah digantung kerja di bawah Perintah Am 34(2) Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 ('G. O. 1980') mulai dari 5 Ogos 1991 atas alasan bahawa beliau telah ditahan di bawah s. 4(1) Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969. Berikutnya, perayu merayu terhadap perintah pembuangan kerjanya kepada Lembaga Rayuan ('Lembaga'). Rayuan telah ditolak oleh Lembaga pada 19 Oktober 1992 dan perayu diberitahu tentang keputusan tersebut melalui surat bertarikh 26 November 1992. Pada 24 November 1995, perayu memfailkan tindakan terhadap responden pertama dan kedua memohon deklarasi bahawa pembuangan kerjanya adalah batal dan tak sah dan tidak berkesan atas alasan ianya didasarkan kepada satu perintah tahanan yang tidak sah. Mahkamah Tinggi menolak tindakan perayu dan rayuan beliau ke Mahkamah Rayuan juga telah ditolak. Perayu kemudian diberi kebenaran oleh mahkamah ini untuk merayu atas persoalan-persoalan berikut: (i) sama ada perintah tahanan boleh dicabar melalui satu prosiding kolateral; dan (ii) di mana seorang telah dibuang kerja ekoran dari satu perintah tahanan, sama ada masa mula berjalan dari tarikh perintah tahanan atau dari tarikh keputusan Lembaga disampaikan kepada perayu.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMP menyampaikan penghakiman mahkamah:

(1) Kesahan suatu perintah tahanan tidak boleh dicabar dalam satu prosiding kolateral kerana ianya dilarang oleh undang-undang bertulis. Dalam kes semasa, undang-undang bertulis yang membuat larangan sedemikian adalah fasal 135(2)(d) Perlembagaan Persekutuan dan Perintah-Perintah Am 34 dan 35 G. O. 1980. Melalui peruntukannya, fasal 135(2)(d) jelas melupuskan hak perayu untuk didengar di dalam prosiding disiplin yang diambil terhadapnya atas alasan perintah tahanan semata-mata. Perintah-Perintah Am 34 and 35 memperuntukan bahawa pihak berkuasa disiplin bagi prosiding sedemikian hendaklah memutuskan tentang hukuman yang sesuai sepertimana yang diperuntukkan di bawah Perintah Am 36(i) G. O. 1980 berdasarkan kepada perintah tahanan

A yang wujud. Oleh itu, kuasa perundangan pihak berkuasa disiplin membenarkannya membuat satu perintah yang sah untuk membuang perayu dari perkhidmatan walaupun kesahan perintah tahanan tersebut dipersoalkan.

B **(1a)** Perlu juga dinyatakan bahawa perayu telah membuat satu cabaran kolateral apabila memfail writ dan penyata tuntutan untuk mengisytiharkan pembuangan kerjanya batal dan tak sah disebabkan perintah tahanan yang digunakan terhadapnya tak sah. Perayu tidak boleh mencabar kesahan perintah
C tahanan melalui tindakan pembuangan kerja yang dibawanya. Pertama, tindakan itu tidak dirangka sebagai tindakan untuk mencabar kesahan perintah tahanan, memandangkan tiadanya permohonan untuk deklarasi bahawa perintah tahanan adalah tak sah selain dari Timbalan Menteri tidak dijadikan sebagai
D satu pihak. Kedua, mencabar kesahan perintah tahanan adalah satu salahguna proses mahkamah kerana perayu gagal melakukannya dalam tempoh 36 bulan, iaitu tempoh yang dibenarkan oleh s. 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('Akta') bagi mencabar perintah tahanan, yang
E dibuat pada 5 Ogos 1991. Masa untuk membangkitkan cabaran telah luput pada 4 Ogos 1994, sedangkan writ hanya difailkan pada 24 November 1995, iaitu membabitkan kelengahan yang melebihi 15 bulan selepas berakhirnya tempoh hadmasa. Ini jelas suatu kes di mana doktrin cabaran
F kolateral tidak terpakai.

(1b) Dengan itu, berdasarkan fakta kes semasa, perayu gagal membuktikan bahawa Perintah-Perintah Am 34 dan 35 G.O. 1980 telah tidak dipatuhi. Prosedur telah diikuti dengan
G ketatnya dan tidak terdapat apa-apa kecacatan pada proses pembuatan keputusan oleh pihak berkuasa disiplin. Oleh yang demikian, jawapan kepada soalan pertama adalah dalam bentuk negatif.

(2) Seksyen 2(a) Akta adalah mandatori pada termanya.
H Perkataan "shall" digunakan dua kali di dalam seksyen tersebut, sekaligus menunjukkan bahawa tempoh 36 bulan berkaitan dengan masa tersebut adalah satu keperluan mandatori yang tidak boleh dipendekkan. Ianya dengan itu jelas bahawa masa mula berjalan dari tindakan yang
I dirungutkan dan bukannya dari penyampaian keputusan. 'Tindakan' dalam kes ini adalah keputusan Lembaga membuang kerja perayu. Keputusan ini dibuat pada 19

Oktober 1992 seperti yang dinyatakan oleh surat bertarikh 26 November 1992. Oleh itu, masa untuk memfail tindakan bermula dari tarikh keputusan ini dan hari terakhir untuk berbuat demikian adalah 18 Oktober 1995 dan bukannya 25 November 1995. Jika masa sepatutnya bermula dari tarikh penyampaian keputusan pada 26 November 1992 seperti yang dihujahkan oleh perayu dan bukannya dari tarikh keputusan dibuat pada 19 October 1992, ia seharusnya dinyatakan oleh peruntukan s. 2(a) Akta. Hujah yang dibangkitkan perayu, dengan itu, adalah tersasul. Dalam keadaan yang wujud, tindakan perayu adalah dihalang oleh hadmasa disebabkan beliau lewat 39 hari dalam memfailkan tindakan. Ianya mengikut bahawa jawapan kepada soalan kedua adalah bahawa masa mula berjalan dari tarikh keputusan Lembaga yang menolak rayuan perayu pada 19 Oktober 1992, dan bukannya dari tarikh penyampaian perintah pembuangan kerja kepada perayu pada 26 November 1992.

Case(s) referred to:

Boddington v. British Transport Police [1998] 2 WLR 639 ***(refd)***

Datuk Bandar Kuala Lumpur v. Kuala Lumpur Golf and Country Club Bhd [2005] 3 CLJ 901 FC ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia [1994] 2 CLJ 333 SC ***(refd)***

Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff [1997] 3 CLJ 332 SC ***(refd)***

McGuire v. Hastings District Council [2002] 2 NZLR 577 ***(refd)***

Md Aris Zainal Abidin v. Suruhanjaya Pasukan Polis & Anor [2002] 4 CLJ 10 CA ***(not foll)***

Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(foll)***

Metramac Corp Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***

Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors [2005] 3 CLJ 539 CA ***(refd)***

The Cooperative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 FC ***(refd)***

Twist v. Randwick Municipal Council [1976] 136 CLR 106 ***(refd)***

Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 16, 25(2), para 8 schedule
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)
Federal Constitution, arts. 43A(2), 135(2)(d)
Legal Profession Act 1976, s. 15(5)
Public Authorities Protection Act 1948, s. 2(a)
Public Officers (Conduct and Discipline) (Cap D) General Orders 1980, General Orders 34(2), 35, 36(i)
Rules of the High Court 1980, O. 53 r. 1A
Town and Country Planning Act 1976, s. 23(1)

For the appellant - Karpal Singh (Ramkarpal Singh with him); M/s Karpal Singh & Co
For the 1st & 2nd respondents - Amarjeet Singh Serjit Singh SFC

[Appeal from Court of Appeal, Civil Appeal No: W-01-27-1999]

Reported by Suresh Nathan

JUDGMENT

Nik Hashim FCJ:

[1] On 9 November 2006, this court granted leave to appeal on the following questions:

(1) Whether a detention order can be challenged in a collateral proceeding; and

(2) Where a person has been dismissed pursuant to a detention order whether time begins to run from the date of the detention order or from the date the decision of the Lembaga Rayuan is communicated to the applicant.

[2] On 30 August 1991, the appellant, a driver with the Jabatan Peguam Negara, was suspended from his duties with effect from 5 August 1991 on the ground that he had been detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the PCO). The suspension was pursuant to General Order 34(2) of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 (the G.O. 1980).

[3] By letter dated 16 July 1992, the appellant was dismissed from service with effect from 6 July 1992. The appellant by letter dated 26 July 1992 appealed against the order of dismissal to the

Lembaga Rayuan (the Board). On 19 October 1992 the Board made a decision dismissing the appeal and this decision was conveyed to the appellant *vide* a letter dated 26 November 1992.

[4] On 24 November 1995 the appellant filed an action against the 1st respondent and the 2nd respondent, the Government of Malaysia, seeking a declaration that the dismissal was null and void and of no effect on the ground that it was based on an invalid detention order.

[5] The High Court dismissed the appellant's action. Appeal by the appellant was dismissed by the Court of Appeal. Hence the appeal before us. We heard the appeal on 31 July 2007. At the conclusion of the arguments of both sides, this court unanimously dismissed the appeal with costs and ordered that the deposit be paid to the respondents to account of their taxed costs.

[6] We now give our reasons.

1st Question

[7] The appellant contended before us that the validity of the detention order upon which the appellant's dismissal was based could be challenged in a collateral proceeding in the nature of the civil suit filed by the appellant in the High Court. The detention was invalid as although a Deputy Minister of Home Affairs had the same power as a Minister of Home Affairs under art. 43A(2) of the Federal Constitution, the Deputy Minister who signed the detention order, could not be said to know the state of mind of the Minister, who was said in the detention order to have been satisfied that the appellant ought to be detained. In short he himself could not be said to have applied his mind as to which limb of s. 4(1) of the PCO he was acting under.

[8] With respect, we do not agree. We agree with the respondents that the validity of a detention order cannot be attacked in a collateral proceeding when written law precludes such an attack.

[9] In *Boddington v. British Transport Police* [1998] 2 WLR 639 the House of Lords at p 651 said:

> ... in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an

A administrative act under it. **There are situations in which Parliament may legislate to preclude such challenges being made ...**

[10] The *Boddington* case, *supra*, was referred to in *McGuire v. Hastings District Council* [2002] 2 NZLR 577 where the Privy Council at p 590 reiterated that collateral challenges may be precluded by a statute:

> What counsel for the appellants have invoked are passages in the speeches to the effect that a collateral challenge to the validity of an administrative decision may be raised in civil proceedings ... These passages are qualified, however, by **recognition that a particular statutory context or scheme may exclude such collateral challenges,** *R v. Wicks* [1998] AC 92 being an example in the planning field. (emphasis added)

[11] In the present case the written laws that preclude a collateral attack of the detention order are art. 135(2)(d) of the Federal Constitution and General Orders 34 and 35 of the G.O. 1980 which are reproduced as follows:

Article 135(2)(d)

(1) ...

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this clause shall not apply to the following cases:

(a) ...

(b) ...

(c) ...

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration or protection of women and girls.

General Order 34

(1) Where there has been made against an officer an order of detention, supervision, restricted residence, banishment or deportation, or where there has been an order imposing upon such officer any form of restriction or supervision by bond or otherwise under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration or protection of women and girls, the Head of Department shall apply for a copy of the order from the appropriate authority and upon receipt thereof, shall submit a report together with full particulars of the officer's past record of service to the Appropriate Disciplinary Authority and the Head of Department shall recommend to the Disciplinary Authority whether the officer should be dismissed from the service, reduced in rank or otherwise dealt with depending on the degree of disrepute which the officer brings to the service.

(2) Upon receipt of the report from the Head of Department, the Appropriate Disciplinary Authority shall forthwith suspend the officer from the exercise of his duties.

General Order 35

(1) Notwithstanding anything in General Order 23, if after considering the report and documents submitted by the Head of Department in General Orders 33 and 34(1), the Appropriate Disciplinary Authority is of the opinion that the officer merits dismissal or reduction in rank, it may forthwith direct accordingly; or if it is of the opinion that the officer should be inflicted with a lesser punishment or otherwise dealt with, the Disciplinary Authority may forthwith inflict upon the officer such lesser punishment or deal with him in such manner as it may deem fit.

(2) If as a result of the lesser punishment the officer is not dismissed, the question of his emoluments during the period of his suspension shall be at the discretion of the Director General of Public Services.

[12] Therefore, by its provision, art. 135(2)(d) clearly takes away the right of the appellant to be heard in the disciplinary proceedings taken against him solely on the existence of the detention order. Whereas General Orders 34 and 35 provide that the disciplinary authority of such proceedings is to decide on the appropriate punishment as provided for under General Order 36(i)

of the G.O. 1980 upon the factual existence of the detention order. Thus, the legal power of the disciplinary authority allowed it to make a valid order to dismiss the appellant from the service notwithstanding that the validity of the detention order was in question.

[13] It must also be pointed out that the appellant was making a collateral challenge by filing the writ and statement of claim to declare that his dismissal was null and void because the detention order used against him was not valid. We are of the view that the appellant could not challenge the validity of the detention order through the dismissal action that he brought. Firstly, the action was not framed as an action to challenge the validity of the detention, there being no prayer for a declaration that the detention order was null and void and the Deputy Minister not being made a party. Secondly, challenging the validity of the detention order was an abuse of the court's process because the appellant had failed to do so within the 36 months allowed by s. 2(a) of the Public Authorities Protection Act 1948 (the Act) to attack the detention order which was made on 5 August 1991 and the time for the challenge expired on 4 August 1994 while the writ was only filed on 24 November 1995, a delay of more than 15 months after the expiry of the limitation period. This is a clear case to which the doctrine of collateral challenge does not apply.

[14] In dealing with the G.O. 1980 we must remind ourselves that we are dealing with General Orders that have legislative effect and we must warn ourselves against adding words into them which were never intended (see *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia* [1994] 2 CLJ 333 SC). General Orders 34 and 35 which bind the disciplinary authority to accept the factual existence of the detention order in making the order of dismissal would similarly bind the High Court hearing any application challenging the validity of the detention order. In this regard, we find support in the passage of the judgment of Barwick CJ in *Twist v. Randwick Municipal Council* [1976] 136 CLR 106 said at p 110:

> ... if the legislation has made provision for that opportunity to [be heard] to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard

> and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.

Thus, on the facts of the present case the appellant had failed to show that General Orders 34 and 35 were not complied with. The procedure was strictly followed and in our judgment there was no flaw in the decision making process of the disciplinary authority. In the circumstances, the answer to the 1st question is in the negative.

2nd Question

[15] The 2nd question relates to whether, when a person has been dismissed pursuant to a detention order, whether the time begins to run from the date the decision to dismiss is made or the date of the communication of the decision of the Board to the appellant. In the instant case, the detention order was dated 5 August 1991. The appellant was dismissed from the service *vide* letter dated 16 July 1992 with effect from 6 July 1992. The appellant by a letter dated 26 July 1992 appealed against the order of dismissal to the Board. On 19 October 1992 the Board made a decision dismissing the appeal. This decision was conveyed to the appellant *vide* a letter dated 26 November 1992. On 24 November 1995 the appellant filed the action against the 1st and 2nd respondents.

[16] It was contended by the appellant that time for purposes of the limitation period under s. 2(a) of the Act commences from the date when the decision was communicated by the Board to the appellant, ie, on 26 November 1992; and since the action was filed on 24 November 1995, the appellant was therefore within the limitation period of 36 months to file the action and cited *Md Aris bin Zainal Abidin v. Suruhanjaya Pasukan Polis & Anor* [2002] 4 CLJ 10 in support.

[17] Section 2(a) of the Act states:

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions **shall** have effect:

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(a) the suit, **action,** prosecution or proceeding **shall not lie or be instituted unless it is commenced within thirty-six months next after the act,** neglect or default **complained of** or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof; (emphasis added)

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[18] In our judgment, s. 2(a) of the Act is mandatory in its terms. The word 'shall' is used twice in that section indicating that the 36 months period in respect of time is a mandatory requirement and it cannot be abridged. It is therefore clear that

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time starts to run from the act complained of and not the communication of the decision as contended by the appellant. The 'act' in the present case is the decision of the Board dismissing the appellant's appeal. This decision was made on 19 October 1992 as stated in the letter dated 26 November 1992. Hence, the

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time to file the action runs from the date of the decision and the last day to file it would be on 18 October 1995 and not on 25 November 1995. If time were to run from the date of communication of the decision on 26 November 1992 as contended by the appellant and not the date when the decision

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was made on 19 October 1992, then the provision in s. 2(a) of the Act would have said so in the section. But here there was no such provision. A good example of such provision is found in s. 23(1) of the Town and Country Planning Act 1976 which states:

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23. Appeal against decision of local planning authority

(1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month **from the date of the communication of such decision to him,** ... (emphasis added)

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Therefore, we hold that the contention of the appellant was misconceived. Such being the case, we find that the appellant's

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action was time-barred as he was 39 days late when he filed the action.

[19] In *Datuk Bandar Kuala Lumpur v. Kuala Lumpur Golf and Country Club Bhd* [2005] 3 CLJ 901, Abdul Hamid Mohamad, FCJ (later PCA) delivering the judgment of the Federal Court, referred

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to the case of *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff* [1997] 3 CLJ 332 where it held that the specific law

(referring to the requirement of notices to be posted for three months under s. 15(5) of the Legal Profession Act 1976) overrides the general law under para 8 of the Schedule to the Courts of Judicature Act 1964 (the CJA), which provides for enlargement or abridgment of time for doing any act, when limitation is explicitly provided for. Likewise, s. 2(a) of the Act overrides para 8 of the Schedule to the CJA for s. 2(a) of the Act is a specific provision with no power to enlarge or abridge time. And to hold otherwise would be in direct conflict with s. 25(2) of the CJA and therefore not in accordance with written law.

[20] It is worthy of note that the purpose of s. 2(a) of the Act is to give time period for any action brought against any person acting in execution of statutory or other public duty within 36 months after the act complained of. The 36 months period is incorporated into s. 2(a) as a reasonable period of time for such action and it is not for the court to query legislation but merely to give effect to the will of Parliament as expressed in the law. It is in that spirit we say that the refusal of the Court of Appeal in *Md Aris, supra,* to follow the decision of the Federal Court in *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 is unjustified and in breach of the doctrine of *stare decisis* for not following loyally the decision of the higher court on the same matter. As *Mersing Omnibus, supra,* was the judgment of the Federal Court, the Court of Appeal was bound to follow it whether the Court of Appeal agreed with it or not (see *Metramac Corp Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; *The Cooperative Central Bank Ltd v. Feyen Development Sdn. Bhd.* [1997] 3 CLJ 365; *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539 per Ahmad Fairuz JCA (later CJ)). Indeed it is not for the Court of Appeal to question whether the procedure to require an applicant for *certiorari* to move the court for leave within six weeks from the date of the decision is fair or not. It is a matter for the Rules Committee acting under s. 16 of the CJA to decide. As the law then stood, we rule that *Mersing Omnibus* is still good law with regard to the interpretation of the 'date of the proceeding' under the then O. 53 r. 1A of the Rules of the High Court 1980 (the RHC) to mean the date of the decision of the Minister and not the date the decision was communicated to the appellant as held in *Md Aris*. In construing a statute or for that matter the RHC the duty of the court is limited to interpreting

A the words used by the legislature or RHC and to give effect to the words used by it. (See *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46). In *Md Aris*, however, the Court of Appeal read words which were not in O. 53 r. 1A of the RHC
B and this is a wrong thing to do and as such, the case should not be followed.

[21] Accordingly, our answer to the 2nd question is that time runs from the date of the decision of the Board dismissing the
C appeal by the appellant on 19 October 1992 and not the date of communication of the order of dismissal to the appellant on 26 November 1992.

[22] My learned brothers Abdul Hamid Mohamad, FCJ (later PCA) and Azmel Maamor, FCJ have read this judgment in draft
D and have expressed their agreement with it.

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